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No. 82-15

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

RAY E. OLIVER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICI CURIAE OF CALIFORNIA FARM BUREAU FEDERATION AND FLORIDA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

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BRIEF AMICI CURIAE OF CALIFORNIA FARM BUREAU FEDERATION AND FLORIDA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

California Farm Bureau Federation and Florida Farm Bureau Federation respectfully submit this brief in support of Petitioner's position.[1]

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[1]It should be noted that California Farm Bureau Federation and Florida Farm Bureau Federation submitted a brief *amici curiae*, along with a motion for leave to file that brief, in a case involving similar issues now pending before this Court. That case is *State of Florida v. Brady, et al.* (docket number 81-1636).

INTEREST OF AMICI CURIAE CALIFORNIA FARM BUREAU FEDERATION AND FLORIDA FARM BUREAU FEDERATION

California Farm Bureau Federation is a voluntary, non-governmental, non-profit California corporation. Its primary purpose is to protect and foster agricultural interests throughout the State of California. Its members consist of 52 county Farm Bureaus with a combined membership at the close of its 1982 membership year of over 99,000 families. Over 85% of all commercial farmers in the State of California are members of county Farm Bureaus.

Florida Farm Bureau Federation is a voluntary, non-governmental, non-profit Florida corporation. Its primary purpose is to protect and foster agricultural interests throughout the State of Florida. Its members consist of 64 county Farm Bureaus with a combined membership of over 95,000 families. Over 90% of all commercial farmers in the State of Florida are members of county Farm Bureaus.

California Farm Bureau Federation and Florida Farm Bureau Federation submit this brief *amici curiae* expressing their views in this case because this Court's disposition herein of the question regarding the scope of the "open fields" doctrine will affect the privacy rights and day-to-day operations of a substantial portion of the membership of their member county Farm Bureaus.

The factual circumstances of the case at bar involve the efforts of the United States to prosecute a suspected manufacturer of contraband. However, the Court's disposition of this case will impact not only the parties to this case or parties to future cases involving similar facts.

Rather, this Court's determination as to the scope and applicability of the "open fields" doctrine will affect the privacy rights of all law-abiding farmers and ranchers throughout the nation and their right to conduct their businesses without unwarranted governmental intrusion or interruption. Specifically, the outcome of this case will bear on the practice of entering agricultural fields at will currently exercised by law enforcement authorities, such as the United States Border Patrol.

California Farm Bureau Federation and Florida Farm Bureau Federation submit this brief to apprise the Court of the background of the U.S. Border Patrol practice of entering agricultural fields at will and the impact which the Court's opinion in the case at bar will have on that practice. Thus, the Court will be better enabled to render a comprehensive interpretation of the scope of the "open fields" doctrine and clear guidelines as to what does and does not constitute an "open field."

SUMMARY OF THE BRIEF AMICI CURIAE

This brief *amici curiae* discusses an on-going problem faced by hundreds and perhaps thousands of agricultural employers in this country.

For years, law enforcement agencies have relied on the "open fields" doctrine to enter agricultural fields at will. Of particular concern to agricultural employers is the reliance of the U.S. Border Patrol on that doctrine as authority to enter agricultural fields at will in search of undocumented aliens. Agricultural employers who are not also farm labor contractors as defined by statute (Farm Labor Contractor Registration Act of 1963, *as amended*, 7 U.S.C.

§ 2045(f)[2]) are not subject to prosecution under federal law for merely employing undocumented aliens (Immigration and Nationality Act, *as amended*, 8 U.S.C. § 1324(a)); nevertheless, the privacy and property rights of these employers are infringed routinely by immigration officers who regard agricultural fields as though the fields were open to the public.

This brief argues that the "open fields" doctrine does not authorize law enforcement officers to enter farms or other agricultural operations without valid consent or a particularized warrant. In the alternative, this brief argues that the "open fields" doctrine, as modified by this Court's opinion in *Katz v. United States*, 389 U.S. 347 (1967) and as interpreted by this Court in *Air Pollution Variance Board v. Western Alfalfa*, 416 U.S. 861 (1973), does not authorize law enforcement officers to enter the fields of a farmer or rancher who has taken reasonable steps to exclude the public therefrom, unless the officers first obtain valid consent or a particularized warrant, or have probable cause to believe that undocumented aliens are present in the fields, coupled with exigent circumstances justifying an immediate entry.

While *amici curiae* are convinced that *Katz* and *Western Alfalfa* compel the adoption of the latter argument, they

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[2]The Farm Labor Contractor Registration Act, *as amended*, 7 U.S.C. § 2041 *et seq.* remains in effect until April 14, 1983. On April 14, 1983, the Migrant and Seasonal Agricultural Worker Protection Act. Pub. L. No. 97-470 (1982) becomes effective, repealing the Farm Labor Contractor Registration Act of 1963, *as amended*. However, § 106(a) of the Migrant and Seasonal Agricultural Worker Protection Act will continue to prohibit farm labor contractors from hiring undocumented aliens.

are equally convinced that adoption of the former argument is compelled by concerns for privacy, property and due process rights of their members.

ARGUMENT

I

FARMS SHOULD ONLY BE ENTERED BY LAW ENFORCEMENT OFFICIALS WHO HOLD PROPERLY EXECUTED WARRANTS NAMING THE INDIVIDUALS BEING SOUGHT

In *Hester v. United States*, 265 U.S. 57 (1924) this Court first enunciated the so-called "open fields" doctrine. *Hester* held that the protections accorded by the Fourth Amendment to the United States Constitution do not extend to "open fields."

The "open fields" doctrine and other common-law property concepts are currently the basis for law enforcement officials to assert they have a carte blanche to enter agricultural fields at will. For example, the current policy of the immigration authorities which regards agricultural fields and other areas beyond the curtilage of a dwelling as unprotected by the Fourth Amendment is as follows:

> **The lawfulness of the search or seizure depends on whether or not it is reasonable under the Fourth Amendment to the Constitution, i.e. whether or not a warrant is required, and, if so, whether the warrant is valid and a proper search is made pursuant to the warrant.**
>
> . . . .
>
> **. . . There is, however, considerable case law holding that the Fourth Amendment does not apply to entry**

> onto so-called "open fields" . . . . The term "open fields" has been construed as applicable to private lands, not including dwellings, which are beyond the curtilage (an area of domestic use immediately surrounding a dwelling and usually, but not always, fenced in with the dwelling).

U.S. DEP'T OF JUSTICE, PUB. NO. M-69, THE LAW OF SEARCH AND SEIZURE FOR IMMIGRATION OFFICERS 24 (rev. Dec. 20, 1979).

The immigration authorities argue that because agricultural lands are beyond the curtilage of a dwelling, they are "open fields" and beyond the scope of protection of the Fourth Amendment. Therefore, Border Patrol agents need to obtain neither consent nor warrant in order to enter agricultural lands; nor do they need to have probable cause that some criminal activity is occurring thereon coupled with exigent circumstances prior to making such entry.

Along with state Farm Bureau organizations in 46 other states and Puerto Rico, *amici curiae* California Farm Bureau Federation and Florida Farm Bureau Federation are members of the American Farm Bureau Federation (AFBF). The AFBF is a voluntary non-governmental, non-profit Illinois corporation. Its purpose is to promote, protect and represent the business, economic, social and educational interests of farmers and ranchers throughout the United States. The AFBF represents more than 3 million member families.

At the 64th Annual Meeting of the American Farm Bureau Federation held in Dallas, Texas, in January 1983, the elected voting delegates of member state Farm Bureaus adopted the following policy, which is binding upon and

is the policy of each state Farm Bureau, including *amici curiae* California Farm Bureau Federation and Florida Farm Bureau Federation:

> Laws governing the apprehension of illegal aliens should be carried out uniformly and equally in all industries. Entry to farms and agricultural operations should be permitted only when immigration officials hold properly executed warrants which name individuals that are being sought.

The policy quoted above demonstrates the strength of concern which growers have regarding searches by officers upon agricultural lands. Growers feel that indiscriminate entries and searches—especially on a routine basis—violate their property, privacy and due process rights. To alleviate this injustice, *amici curiae* California Farm Bureau Federation and Florida Farm Bureau Federation urge this Court as a part of its opinion in this case to disapprove expressly the notion that its opinion in *Hester v. United States, supra,* authorizes at will entries by officers onto farms and agricultural operations.

II

THE "OPEN FIELDS" EXCEPTION TO THE FOURTH AMENDMENT SHOULD NOT APPLY TO FIELDS CLOSED TO THE PUBLIC

At the time it was rendered and for some 43 years thereafter, the holding of *Hester v. United States, supra,* that the protections accorded by the Fourth Amendment to the United States Constitution do not extend to "open fields," was consonant with the then-existing principle that common-law property concepts control Fourth Amendment

analysis. However, with this Court's opinion in *Katz v. United States*, 389 U.S. 347, 351, 361 (1967) that "the Fourth Amendment protects people, not places" and protects an individual from unreasonable governmental intrusion when he exhibits an actual and reasonable expectation of privacy, common-law property concepts no longer ultimately determine whether or not Fourth Amendment protections apply to particular types of governmental intrusions.

Despite the effect of *Katz* on Fourth Amendment analysis, law enforcement officials such as the United States Border Patrol have continued to rely on the "open fields" doctrine and other common-law property concepts as a carte blanche for entering agricultural fields at will. While this simplistic approach to Fourth Amendment issues may make it easy for officers to decide whether or not Constitutional protections extend to a particular area, the approach is contrary to proper Fourth Amendment analysis since *Katz*.

Katz and its progeny shifted the focus of judicial inquiry regarding Fourth Amendment issues from one relying solely on common-law property concepts to one relying on the "reasonable expectation of privacy" doctrine. While it is true that Fourth Amendment analysis continues to rely to a great extent on the nature of the property where a search occurred, the nature of the property in question is now a guiding, rather than controlling, factor. *Katz*, in other words, modified previous Fourth Amendment analysis by requiring courts to examine the characteristics of the property where a search occurred in conjunction with the "reasonable expectation of privacy" doctrine.

Indeed, "reasonable expectation of privacy" must now be regarded as the controlling factor in Fourth Amendment analysis. For example, in *Air Pollution Variance Board v. Western Alfalfa*, 416 U.S. 861 (1973), this Court recognized the continuing existence of the "open fields" exception to the Fourth Amendment; nevertheless, in applying the "open fields" exception, the *Western Alfalfa* court recognized that the exception must be applied in light of *Katz*.

In *Western Alfalfa*, a state health inspector had entered defendant-corporation's outdoor premises in the daylight, without its knowledge or consent and without a warrant, to make an opacity test of smoke being emitted from the plant chimney. This Court at 416 U.S. 864-65 stated:

> The field inspector did not enter the plant or offices. . . . He had sighted what anyone in the city who was near the plant could see in the sky—plumes of smoke. The Court in *Hester v. United States* [citation] . . . refused to extend the Fourth Amendment to sights seen in the "open fields." The field inspector was on respondent's property *but we are not advised that he was on premises from which the public was excluded.* Under the Noise Control Act of 1972 [citation] an inspector may enter a railroad right-of-way to determine whether noise standards are being violated. The *invasion of privacy* in either that case or the present one, if it can be said to exist, is abstract and theoretical. . . . Depending upon the layout of the plant, the inspector may operate within or without the premises but in either case he is well within the "open fields" exception to the Fourth Amendment approved in *Hester*. (Emphasis added.)

While the last sentence of the above quotation indicates that the "open fields" doctrine continues to exist as an exception to the Fourth Amendment, the phrases "invasion of privacy" and "we are not advised that he was on premises from which the public was excluded" indicate that the "open fields" doctrine has been modified by the "reasonable expectation of privacy" doctrine of *Katz*. Thus, under *Katz* and *Western Alfalfa*, it is the degree of public exclusion exercised by the party asserting his Fourth Amendment rights which is the critical factor in determining the "openness" of a field.

In fact, public exclusion from property is the feature which harmonizes the "reasonable expectation of privacy" and "open fields" rules. For example, where fields are closed to public entry, the "open fields" doctrine should not apply; by closing his fields, the individual expects them to remain private and free from unwarranted intrusion. On the other hand, where an individual does nothing to close his lands from public intrusion, he cannot later claim that he had exhibited a subjective expectation of privacy therein; in that situation, the application of the "open fields" doctrine would be proper.

Lower courts have recognized the effect of *Katz* on *Hester*:

> In *Katz v. United States* [citation] the court held that the Fourth Amendment protects people, not "places." Ever since that decision, the determination of whether an intrusion is an unreasonable search has depended on one's actual subjective expectation of privacy and whether that expectation is objectively reasonable. See [citation]. Thus, the focus is no longer on common law property concepts. See *Wattenburg v. United States*,

> 388 F.2d 853, 857 (9 Cir. 1968). It now appears that *Hester* no longer has any independent meaning but merely indicates that open fields are not areas in which one traditionally might reasonably expect privacy. *United States v. Magana*, 512 F.2d 1169, 1170 (9 Cir. 1975); *Patler v. Slayton*, 503 F.2d 472, 478 (4 Cir. 1974).

United States v. Freie, 545 F.2d 1217, 1223 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977). *See also United States v. Basile*, 569 F.2d 1053, 1056 (9th Cir. 1978), *cert. denied*, 436 U.S. 920 (1978).

Further recognition of the effect of *Katz* on *Hester* is demonstrated by the following excerpt:

> Under *Hester v. United States* [citation] Perez had no Fourth Amendment protection in his backyard. However, that holding is clearly modified by the reasonable expectation of privacy doctrine of *Katz v. United States* [citation].

United States v. Perez, 440 F.Supp. 272, 287, n.43 (N.D. Ohio 1977), *aff'd*, 571 F.2d 584 (6th Cir. 1978), *cert. denied*, 435 U.S. 998 (1978).

Amici curiae California Farm Bureau Federation and Florida Farm Bureau Federation argue that the result of these decisions is a severe reduction of the importance of common-law property concepts in Fourth Amendment analysis. The concept of curtilage, for example, no longer has any independent meaning but merely describes an area in which one traditionally might expect privacy. Thus, *amici curiae* California Farm Bureau Federation and Florida Farm Bureau Federation assert that even in a field, one may have a reasonable expectation of privacy deserving the protections of the Fourth Amendment.

III

GROWERS WHO EXCLUDE THE PUBLIC FROM THEIR FIELDS REASONABLY EXPECT PRIVACY IN THEIR "FACTORIES WITHOUT WALLS"

The notion that growers are entitled to the protections of the Fourth Amendment in fields devoted to commercial purposes is strongly supported by case law regarding the applicability of those protections to other business operations. It is well-settled that the Fourth Amendment protects business operators against unreasonable searches and seizures. Unless they first have valid consent given by one lawfully entitled to give such consent or probable cause that criminal activity is occurring coupled with exigent circumstances, law enforcement officers may not enter commercial premises from which the public is excluded unless they have obtained a valid warrant.

The Fourth Amendment protects not only private homes (*Weeks v. United States*, 232 U.S. 383, 390-94 (1913)), but extends to "the portions of commercial premises which are not open to the public." *See v. City of Seattle*, 387 U.S. 541, 545 (1966).

> The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

See v. City of Seattle, supra at 543; *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978).

The immigration authorities themselves recognize that a businessman is entitled to the protections of the Fourth Amendment in areas of commercial premises closed to the public:

> Only under very special circumstances is the search without a search warrant of a . . . business office . . . justifiable and hence not a violation of the Fourth Amendment. . . . This is a most precious right, and the general requirement that a search warrant be obtained is not lightly to be dispensed with.
>
> . . . .
>
> When a Service officer has reason to search . . . the nonpublic areas of a commercial building, he should, in the absence of consent, seek an appropriate search warrant based on probable cause to believe that violators or evidence of the violation of the civil or criminal provisions of the immigration laws are on the premises.

U.S. DEP'T OF JUSTICE, *supra* at 25-26.

It follows that a farmer, whose business is producing agricultural commodities and whose commercial premises include his fields, is entitled to the same standard of protection under the Fourth Amendment that other businessmen enjoy, all else being equal. In other words, if a farmer exhibits an actual and reasonable expectation of privacy as to his fields, then government officials should not be allowed to enter onto or search those fields without valid consent or a warrant, unless the search falls within the narrow category of exceptions to the warrant requirement.

As a rule, farmers do exclude the public from their production areas. Conscious of the potential problems of theft, vandalism, and disruption of their business operations, farmers generally prohibit the public from entering their fields. Where practical, many growers post "no trespassing" signs and erect fences or gates in order to exclude the public from their fields. Growers or their agents order from their lands trespassers who may be discovered thereon, such as in the case at bar.

By taking such measures, farmers in effect "close" their fields. The fact that it is not feasible for farmers to wall off their fields from possible intruders should have no effect upon their expectation of privacy which they otherwise exhibit. One District Court of Appeal in California elaborates on this idea:

> Short of erecting an impenetrable enclosure, we can conceive of no other feasible measures the rural dweller might reasonably undertake to assert and preserve his individual right of privacy. We agree with the Phelan court that no perceptible difference exists "between [wholly] fenced land on the one hand and open land having a particular enclosed area on the other hand, insofar as the Fourth Amendment is concerned." [Citation.] To contemplate a contrary conclusion would itself lend credence to a specter of citadel-like fortifications in order to safeguard an otherwise objectively reasonable expectation of privacy of the contemporary rural dweller, a refuge neither required nor compatible with established constitutional principles.

Burkholder v. Superior Court, 96 Cal.App.3d 421, 429, 158 Cal.Rptr. 86 (1st Dist. Ct. App. Cal. 1979).

As a result of the modification of the *Hester* "open fields" exception to the Fourth Amendment by the *Katz* "reasonable expectation of privacy" doctrine, some courts have recognized that " 'open fields' may, in certain cases, be protected by the Fourth Amendment." *United States v. DeBacker*, 493 F.Supp. 1078, 1079 (W.D. Mich. 1980). At 493 F.Supp. 1081, the *DeBacker* court explains its reasoning for this proposition:

> [A] reading of the Fourth Amendment [that under *Katz*, "open fields" are outside Fourth Amendment protection because no reasonable expectation of privacy exists in such places] would provide police with a carte blanche to investigate areas outside of a homestead's curtilage. . . .
>
> I am convinced that *Katz* compels a more sensitive reading of the Fourth Amendment. [Citation.] Instead of declaring entire areas as outside of Fourth Amendment protection, I believe *Katz* compels an analysis of the particular type of surveillance, and its effect on the privacy and security of citizens. [Citation.] As Justice Harlan discussed in his dissenting opinion in *United States v. White*, 401 U.S. 745, 786, 91 S.Ct. 1122, 1143, 28 L.Ed.2d 453 (1971), Fourth Amendment analysis requires "assessing the nature of the particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement." The ultimate question, therefore, is not whether the surveillance in this case occurred in "open fields." Instead, the issue is whether "if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." [Citation.]

The above-quoted language by the *DeBacker* court is especially appropriate when considering the applicability of the "open fields" doctrine to searches where law enforcement officers do not discover the illegal nature of the object of their search until after they have entered the area where the object is located. Many cases dealing with the "open fields" doctrine have involved a search for an object whose illegal nature was discovered by mere observation of the object from a vantage point outside the area in question. For example, aerial surveillance of a field from an aircraft flying at legal altitudes may result in the discovery of plant growth which appears to be marijuana. The illegal nature of the object of such aerial surveillance is apparent from visual observation of the object alone, and such observation would provide probable cause that criminal activity is occurring on the land in question.[3]

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[3]Even in a situation such as that, however, "[t]he fact that the presence of the contraband . . . was discovered by resort to plain view instead of, say, information supplied by a reliable informant, has no bearing upon the question of whether an intrusion into those premises may now be made for the purpose of seizing that contraband. As the Court stated in [*Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971)]:

> plain view alone is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle • • • that no amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure."

1 W. LaFave, Search And Seizure: A Treatise On The Fourth Amendment § 2.2(a), at 224 (1978) (footnote omitted). *See Taylor v. United States*, 286 U.S. 1 (1932); *Burkholder v. Superior Court, supra.*

Another example is found in *Air Pollution Variance Board v. Western Alfalfa, supra.* As this Court noted there, the inspector "had sighted what anyone in the city who was near the plant could see in the sky—plumes of smoke." Again, the illegal nature of the substance in question (*i.e.*, the smoke) was discovered by mere observation from afar.

Searches where law enforcement officers do not discover illegality until after they have entered the area where the illegal object is located are a different matter. For example, in the typical search for undocumented workers upon agricultural lands, Border Patrol agents locate, either by aerial or ground surveillance, a group of workers. The agents thereupon enter the agricultural fields, approach the workers, and question them as to their legal right to be in the United States. It is as a result of this questioning that the agent determines whether or not there is probable cause to believe that a particular worker is in violation of immigration laws. Similarly, in the case at bar the state police detectives did not discover any illegal activity until after they had entered Petitioner Oliver's farm.

A search where law enforcement officers do not discover illegality until after they have entered the area where the illegal object of their search is located results is a significantly greater intrusion into the privacy and freedom of the individual on whose lands the search occurs than does the discovery of illegality from a vantage point outside the area where the illegal object is located. The very nature of the former type of search, for example, requires Border Patrol agents to enter agricultural lands only when workers are present thereon. Such searches severely disrupt the work being performed by the farmworkers, whether or not

there are undocumented workers present. Many times these searches occur when critical work must be performed as quickly as possible, resulting in substantial production losses due to the disruption of tight production schedules. Unlike the situation in *Air Pollution Variance Board v. Western Alfalfa, supra,* the invasion of privacy resulting from this type of search is not "abstract and theoretical" (*Id.* at 865); rather, it is concrete and real.

Furthermore, growers feel that such entries and searches harass and reduce them to the status of second-class citizens. The first sentence of the American Farm Bureau Federation policy quoted *supra* at page 7 is in reaction to the current state of uneven enforcement of immigration laws. In remarks to the United States Senate made during floor debate, former U.S. Senator S. I. Hayakawa of California noted:

> Immigration Service statistics show us that 8 percent of the illegal aliens employed in the United States are working in agriculture. However, almost 50 percent of the undocumented alien workers apprehended are agricultural workers.

128 CONG. REC. S10,479 (daily ed. Aug. 13, 1982). Growers feel that this disproportionate share of scrutiny is due primarily to the ability of officers under present policy to enter fields at will, whereas a different enforcement policy advises officers, "in the absence of consent, [to] seek an appropriate search warrant" before searching the nonpublic areas of a commercial building. U.S. DEP'T OF JUSTICE, *supra* at 26.

Growers feel that they are being subjected to a double standard and undue harassment as a result of the dis-

crepancy between the law enforcement search policies regarding commercial agricultural operations and other types of commercial operations. Such feelings result in contempt for the law and a sense of frustration.

Moreover, growers have reported numerous instances of property damage caused by hasty and careless Border Patrol entries onto their fields. Such damage may include the destruction of crops, crop supportive structures, fences, gates, and unpaved avenues. Even more frightening are reports of situations where growers, workers, or their children have been injured or have narrowly escaped injury during this type of search operation.

Before invading the privacy of an individual and causing such disruption and damage, law enforcement officers, including Border Patrol agents, should have probable cause to believe that specific criminal activity is occurring upon private agricultural lands they intend to search and, in the absence of valid consent or exigent circumstances, should be required to procure from a neutral magistrate a particularized warrant based on such probable cause.

IV

THE POLICY OF LAW ENFORCEMENT OFFICIALS WHICH REGARDS AGRICULTURAL LANDS PER SE AS UNPROTECTED BY THE FOURTH AMENDMENT IS CONTRARY TO PROPER FOURTH AMENDMENT ANALYSIS

This Court has noted that the Fourth Amendment generally requires that a warrant be obtained, and the burden of showing an exemption (*e.g.*, exigent circumstances or pervasively regulated business) from this requirement is on the government. *Chimel v. California*, 395 U.S. 752, 762

(1969); *United States v. Jeffers*, 342 U.S. 48, 51 (1951); *McDonald v. United States*, 335 U.S. 451, 456 (1948). "Except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967); *Marshall v. Barlow's, Inc.*, *supra* at 312.

The practice of law enforcement officials which regards agricultural lands *per se* as beyond the scope of Fourth Amendment protections is contrary to the above-noted presumption and burden of proof. The warrant requirement is the rule, not the exception. A policy which circumvents that rule opens the door to a host of potential situations of agent misconduct or mistake. Such misconduct could include searches motivated by bribery or by personal reasons such as an officer's personal dislike of or quarrel with a grower. For example, such mistakes occur when Border Patrol agents apprehend citizens or documented workers who may not be carrying documentation on their persons at the time of apprehension.

In order to minimize such instances of misconduct or mistake law enforcement officers should be required to follow the same procedures under the Fourth Amendment when they wish to search an agricultural field closed to the public that they must follow when they wish to search any other type of commercial premises not open to the public.

CONCLUSION

In the case at bar, the United States Court of Appeals for the Sixth Circuit, sitting *en banc,* incorrectly held that any expectation of privacy in an "open field" is *per se* unreasonable. The holding undercuts this Court's holding in *Katz v. United States, supra,* that "the Fourth Amendment protects people, not places." Unless this Court reverses the Sixth Circuit court's holding and acknowledges that growers are entitled to the same standard of protection under the Fourth Amendment that other businessmen enjoy, law enforcement officials will continue to apply a double standard regarding searches of commercial agricultural operations and commercial operations of other types.

WHEREFORE, *amici curiae* California Farm Bureau Federation and Florida Farm Bureau Federation respectfully pray that this Court reverse the judgment below.

Respectfully submitted,

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